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ALEXANDER L. STEVENS,

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

J. BARANELLO & SONS,

Plaintiff-Petitioner,

- against -

CITY OF PATERSON,

Defendant-Respondent,

CONSOLIDATED PRECAST, INC.,

Plaintiff-Cross Petitioner,

- against -

CITY OF PATERSON,

Defendant-Respondent
On The Cross Petition.

On Writ of Certiorari To The Supreme
Court of New Jersey

CROSS-PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the New Jersey Courts err in holding, contrary to Federal Circuit Court decisions rendered under the Federal Arbitration Act, 9 U.S.C. Sections 1-14 (which this Court has held to create a body of Federal substantive law applicable in both Federal and State courts), and contrary to the opinions of this Court that an industry arbitration panel deciding commercial disputes must disclose the basis of its award in sufficient detail to establish that the panel followed all of the technical rules of contract interpretation and all of the technical rules of evidence that a State court might have applied in hearing the same case, and that the arbitration award must be vacated and the matter remanded

"for a new arbitration proceeding" because the panel failed to do so.

2. Did the New Jersey Courts err in holding, contrary to Federal Circuit Court decisions rendered under the Federal Arbitration Act, 9 U.S.C. Sections 1-14, and contrary to the opinions of this Court that what the court determined to be an erroneous ruling on the admissibility of certain evidence which may have affected the award required vacation of the arbitration award.

3. Did the New Jersey Courts err in holding, contrary to Federal Circuit Court decisions rendered under the Federal Arbitration Act, 9 U.S.C. Sections 1-14, and contrary to the opinions of this Court that an arbitration award is to be vacated upon a finding by the court that the arbitrators may have interpreted relevant contract provisions differently from the court's interpretation.

PARTIES TO THE PROCEEDINGS BELOW

The parties below include
Petitioner J. Baranello & Sons (a New
York partnership), Cross-Petitioner
Consolidated Precast, Inc. (a Connecticut
corporation), Independent Electrical
Construction Co., Inc., Davidson & Howard
Plumbing & Heating, Inc. and The
Conditioning Co., Inc. all New Jersey
corporations each of whom sought
confirmation of arbitration awards .
against Respondent City of Paterson, New
Jersey by separate actions which were
consolidated for trial, appeal and on
Petition for Certification to the New
Jersey Supreme Court. The arbitration
award sought to be enforced in the
consolidated actions was a consolidated
arbitration proceeding.

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OFFICIAL AND UNOFFICIAL REPORT OF
OPINIONS OF THE COURTS BELOW

The opinions involved in the within action have, to date, not been reported in either the official or unofficial reporting systems.

GROUND'S OF JURISDICTION

The judgment to be reviewed was issued by the Supreme Court of New Jersey under date of November 21, 1983, and was entered on November 28, 1983.

The statutory provisions which confer jurisdiction upon this Court are 28 U.S.C. Section 1257(3) and 9 U.S.C. Sections 1-14.

The within Cross-Petition arises out of the same action involved in the Petition for Writ of Certiorari filed by J. Baranello & Sons under Docket No. 83-1430 which was received by Respondent, Cross-Petitioner Consolidated Precast, Inc. on March 2, 1984.

THE STATUTE AT ISSUE

The pertinent sections of the Arbitration Act, 9 U.S.C. Sections 1-14 are set forth in the appendix submitted with the Petition for Certiorari filed on behalf of J. Baranello & Sons (BA22-25*).

* Documents contained in the Appendix to Baranello's Petition are not reproduced in the Appendix hereto. References to the Appendix to Baranello's Petition are designated BA. References to the Appendix attached hereto are designated CA.

STATEMENT OF THE CASE

Procedural History of the Litigation

In April 1977, respondent, cross-petitioner Consolidated Precast, Inc. ("Consolidated"), a Connecticut corporation, entered into a contract with defendant-respondent City of Paterson, New Jersey, for the construction of precast concrete to be formed at its Connecticut plant and incorporated into the construction of a building to house the City's police and fire departments. The City also entered into separate prime contracts with plaintiff-petitioner J. Baranello & Sons, a New York partnership and the other contractors referenced above. The contracts between the parties included the standard form "A.I.A. Document A201, General Conditions of the Contract for Construction" issued by the

American Institute of Architects (the "General Conditions"). (Relevant portions of the General Conditions are set forth in the Baranello Appendix at BA31-35)

Article 7.10 of the General Conditions (A29) provides that "[A]ll claims, disputes and other matters in question arising out of, or relating to, this contract, or the breach thereof, ...shall be decided by arbitration in accordance with the construction industry arbitration rules of the American Arbitration Association...". The article goes on to provide that "the award rendered by the arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof."

Work on the project was to commence in May, 1977. For a variety of reasons, which were developed by the parties in the underlying arbitration, the project

was delayed almost from its inception. During the progress of the project, disputes arose between Consolidated and the City regarding the aforesaid delays as well as other matters including Consolidated's right to payment of its retainage and with respect to unresolved change orders. Similar disputes arose between the City and the other parties herein.

The aforesaid disputes resulted in the commencement of an arbitration between the City and the various plaintiffs entitled "In the Matter of the Arbitration Between Independent Electrical Construction Co., Inc. and Davidson & Howard Plumbing & Heating, Inc. and the City of Paterson and The Conditioning Co., Inc. and Consolidated Precast, Inc. and J. Baranello & Sons, Inc., Case No. 18 10 0091 78" (the "arbitration").

The arbitration was heard by a panel of arbitrators in 23 full-day sessions between September, 1980 and May 27, 1981. During the arbitration, all of the plaintiffs presented their claims against the City for retainage, delay damages and additional compensation for unresolved change orders. The City presented claims against each of the contractors.

Throughout the course of the arbitration hearings, the arbitrators uniformly denied objections to testimony and motions to limit proofs in favor of a policy permitting all parties to present whatever proofs they wished to present. This policy is exemplified by the ruling of the arbitrators at a hearing held on December 17, 1980, which denied the informal application of defendant to preclude the arbitrators from hearing evidence which would relate

to delay claims arising before December, 1977, the time when the City contended the requisite written notices of claim were given. The motion by the City was predicated upon Article 8.3.2 of the General Conditions (BA34) which required that all claims for extensions of time be made in writing to the architect no more than 20 days after the occurrence of the delay. By that time, the arbitrators had already heard testimony regarding written notification of delay and requests for extension of time being given to the architect by Consolidated as early as June, 1977, and they had received in evidence minutes of job meetings from June, 1977 which contained statements that the progress of the entire project was being delayed.

On October 19, 1981, the arbitrators issued a unanimous award which encompassed all of the claims

presented. (BA28) The award provided for the following relief with respect to the claims between Consolidated and the City:

CITY OF PATERSON shall pay to
CONSOLIDATED PRECAST, INC.
the sum of TWO HUNDRED
NINETY-SIX THOUSAND NINE
HUNDRED DOLLARS
(\$296,900.00), which sum
includes all retainage due
under the contract between
the parties, plus the amount
resulting from delays, and
unresolved changes, where
applicable.

The award decided the claims between the other plaintiffs and the City in a similar fashion. The respective plaintiffs filed separate Verified Complaints and Orders to Show Cause in the Superior Court of New Jersey, Law Division, for a judgment confirming the award of the arbitrators and for prejudgment interest. After consolidating these actions, the Court on November 13, 1981 confirmed the awards and awarded prejudgment interest from the

date of award. (BA14) The Court found that the City had failed to establish any grounds for vacating or modifying the award.

The City appealed this decision to the Appellate Division of the New Jersey Superior Court. The Appellate Division reversed the judgment confirming the arbitration award, vacated the award and remanded the matter "for a new arbitration proceeding." (BA4)

The ruling of the Appellate Division was based on its interpretation that Articles 12.1.6, 12.1.7 and 12.2.1 of the General Conditions¹ required that written notice of a claim be given to the architect within 20 days of various triggering events. The Court further held that in its view, the contract precluded recovery for damages

¹ These contract provisions are set forth in the Baranello Appendix at BA34-35.

occurring more than 20 days prior to said notification. (BA8) Since the arbitrators had failed to limit the contractors' proofs of delay damages to 20 days prior to written notification of claims, the Court concluded that the entire award must be vacated because there was no way of knowing if the arbitrators had included delay damages for periods prior to formal written notification of claim. (BA10-11)

Interestingly, the Appellate Division in its construction of the contract relied upon sections of the General Conditions different from those relied upon by the City in its motion to preclude evidence. The City relied on Article 8.3.2 (BA34) which required written notice of claim for an extension of time to be made upon the architect within 20 days after the occurrence of a delay. It was amply demonstrated that

these written notices were given from the start of delays by all contractors through the job meetings and by Consolidated by formal letter to the architect. Also, the City admitted that it had actual knowledge of the delays from their inception. The Appellate Division recognized these facts, but distinguished the Article 8.3.2 notice of claim from the Article 12 notices and chose to rely on Article 12 in its construction of the contract. (BA8) In addition, the Appellate Division found that under its construction of the contract, actual knowledge of the delays and of claims was meaningless. (BA10)

Finally, the Appellate Division totally ignored Article 7.4.1 of the General Conditions (BA32) which reads as follows:

Should either party to the contract suffer injury or damage to person or property

because of any act or omission of the other party or any of his employees, agents or others for whose acts he is legally liable, claims shall be made in writing to such other party within a reasonable time after the first observance of such injury or damage.

Each of the plaintiffs filed Petitions for Certification with the Supreme Court of New Jersey for review of the judgment of the Appellate Division. These Petitions were denied by Order dated November 21, 1983, and filed November 28, 1983. (BA1)

THE FEDERAL QUESTION PRESENTED

As above stated, the questions presented by this case revolve around the permissible scope of review by an appellate court of an arbitration award under the Federal Arbitration Act, 9 U.S.C. Sections 1-14, and whether a reviewing court can vacate an award based

upon the absence of stated reasons for decision sufficient to convince the court that the arbitrators followed technical rules of contract interpretation and technical rules of evidence, and whether the reviewing court can vacate based upon the mere possibility that the arbitrators entered an award contrary to the court's interpretation of the contract and of law.

The effect of the Federal Arbitration Act was not raised as an issue before the Law Division of the Superior Court of New Jersey or before the Appellate Division of the Superior Court. Prior to the judgment of the Appellate Division in the instant case, it appeared that the Federal Arbitration Act and the New Jersey Arbitration Statute (N.J.S. 2A:24-8 and 9) were not in conflict. Moreover, argument before the Appellate Division was held in November, 1982, prior to the February

1983 decision of this Court in Moses H. Cone Memorial Hospital v. Mercury Construction Corp., ____ U.S. ____, 74 L.Ed.2d 765, 103 S.Ct. 927 (1983), which restated the applicability of the Arbitration Act to state court proceedings. The conflict of the Appellate Division judgment with the rulings of the federal circuits under the Federal Arbitration Act was raised by Consolidated in its Petition for Certification,² but the Supreme Court of New Jersey denied Consolidated's Petition without opinion. (BA1)

² The relevant portion of Consolidated's Petition for Certification is reproduced in the Appendix hereto at CA1-4.

ARGUMENT

Cross-Petitioner Consolidated

Precast, Inc., like Petitioner Baranello, is an out-of-state corporation seeking to confirm an arbitration award rendered against a political subdivision of the State of New Jersey. In the posture of this case, Consolidated stands in the same position as Baranello and seeks the same relief sought in Baranello's Petition. Hence, Consolidated relies primarily upon the arguments put forward by Baranello in support of its Petition for Writ of Certiorari. This position is taken in light of Supreme Court Rule 20.5 which conditions the granting of the within Petition upon the granting of Baranello's Petition. With this in mind, Petitioner sets forth the following by way of augmentation of the argument presented by Baranello in its Petition.

It is submitted further that in view of the virtual identity of the positions of Baranello and Consolidated with respect to the within action and the identical treatment by the New Jersey courts of Baranello and Consolidated, that the following argument supports the granting of both the Petition of Baranello and the Cross-Petition of Consolidated.

Why Baranello's Petition and the Within Cross Petition Should Be Granted

The Petitions in this case should be granted because the decisions of the New Jersey Courts are grossly in conflict with the decisions of this Court and those of the Federal Courts of Appeals which narrowly circumscribe the allowable scope of judicial review of an arbitration award. Supreme Court Rule 17.1(b) and (c). The New Jersey Courts have made the novel and unprecedented determination that an arbitration award

which is valid on its face must be vacated merely because the arbitrators may have interpreted a contract provision different from the Court's interpretation and the award may have been affected thereby. In so doing, New Jersey has effectively subjected arbitration proceedings to the same formality and scope of judicial review applicable to court proceedings. This decision has totally emasculated the basic objective and principal attraction of arbitration which is to obtain a final disposition of disputes in a speedy, inexpensive and less formal manner. If the decision is allowed to stand, arbitration will become every bit as formal, slow and expensive as the litigation process. Ultimately, nobody will have any incentive to elect arbitration as their chosen dispute resolution procedure. In light of the aforesaid, and the strong policy favoring

arbitration embodied in the Federal Arbitration Act, 9 U.S.C., Sections 1 et seq., this appeal definitely presents questions of general public importance which should be settled by this Court. Supreme Court Rule 17.1(c).

THE NEW JERSEY COURT APPLIED AN
IMPERMISSIBLY STRINGENT STANDARD
IN REVIEWING THE ARBITRATION AWARD

The opinion of the Superior Court of New Jersey, Appellate Division (which was left undisturbed by the New Jersey Supreme Court) represents a dangerous departure from time-honored and well-settled principles of law favoring arbitration and encouraging its use as a speedy and less expensive alternative to the formal litigation process. Included among these principles, which the Appellate Division has chosen to ignore in this case, are the extremely broad powers vested in an arbitrator to decide the applicable facts and law, which

exceed those of a trial judge, and the very limited scope of allowable judicial review which is designed to give far greater finality to an arbitration award than afforded a trial court decision. See, United Steelworkers of America, AFL-CIO v. American Smelting and Refining Co., 648 F.2d 863 (3rd Cir. 1981), cert. den. 102 S. Ct. 567, 454 U.S. 1031, 70 L.Ed.2d 474; In re I/S Staubog v. National Metal Converters, Inc., 500 F.2d 424 (2nd Cir. 1974); Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co., 397 F.2d 594 (3rd Cir. 1968), cert. den. 89 S. Ct. 378, 393 U.S. 954, 21 L.Ed.2d 365.

Although the Appellate Division dutifully cites the most current pronouncements by this Court regarding the limited scope of judicial review allowed with respect to an arbitration award, in fact, it subjected this award

to the full scope of judicial review normally reserved for a trial court judgment.

In order to fully appreciate the extremity of the Appellate Division's departure from current standards of permissible review of arbitration awards, it must be recognized that the Appellate Division did not vacate the award because it included pre-notification delay damages. Rather it reversed because the award may have included these damages, evidenced only by the fact that the arbitrators refused to preclude the parties from producing proofs with respect thereto.

Section 31 of the Construction Industry Arbitration Rules of the American Arbitration Association, by which the parties agreed to be bound, provides in relevant part as follows:

The parties may offer such evidence as they desire and shall produce such additional evidence as the arbitrator may deem necessary to an understanding and determination of the dispute.... The arbitrator shall be the judge of the admissibility of evidence offered and conformity to legal rules of evidence shall not be necessary....

Regardless of whether or not it would have been proper for the arbitrators to allow pre-notification of claim delay damages in the context of this case, their ruling on the City's motion to limit proofs was certainly not contrary to the Construction Industry Arbitration Rules or to the agreement of the parties which specifically made those rules applicable.

In United Steel Workers of America v. Enterprise Wheel and Car Corporation, 363 U.S. 593, 4 L.Ed.2d 1424, 80 S. Ct. 1358 (1960), which was quoted at length by the Appellate Division in this case,

this Court set forth a comprehensive statement of the permissible scope of judicial review of arbitration awards. The Appellate Division quoted the opinion in support of the proposition that an arbitrator cannot simply ignore contractual provisions that he is being called upon to interpret. However, the Appellate Division ignored the portion of the decision which prohibits judicial tampering with an arbitration award merely upon the speculation that the arbitrator may have exceeded his authority. The specific language of this Court's opinion is as follows:

The opinion of the arbitrator in this case, as it bears upon the award of back pay beyond the date of the agreement's expiration and reinstatement, is ambiguous. It may be read as based solely upon the arbitrator's view of the requirements of enacted legislation, which would mean that he exceeded the scope of the submission. Or it may be

read as embodying a construction of the agreement itself, perhaps with the arbitrator looking to "the law" for help in determining the sense of the agreement. A mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award. Arbitrators have no obligation to the court to give their reasons for an award.... Id. at 363 U.S. 597, 598, 4 L.Ed.2d 1428.

Even assuming, which we cannot, that the arbitration award did include amounts attributable to delay damages for periods prior to the special written notifications of claim for delay damages that the Appellate Division interprets Article 12 of the General Conditions to require, the decision of the Appellate Division was still nothing more than a substitution of the Appellate Division's interpretation of the applicable contract provisions. Here again, the Appellate

Division decided to disregard the well-settled principle that an arbitration award may not be vacated simply because the reviewing court would have decided the facts or construed the law differently. Id.

In this case, the Appellate Division embraced the notice provisions of Articles 12.1.6, 12.1.7 and 12.2.1 of the General Conditions, which were never even argued by the City, and decided that these provisions are mandatory bars to the right to recover delay damages for periods preceding satisfaction of these purportedly special notification requirements. This conclusion was reached without reference to any supporting authority.

Certainly, the arbitrators could just as easily have found that the Article 12 notice requirements were intended to be limited to the particular

claims for additional compensation envisioned by each of them. Therefore, Article 12.1.6 was limited to unknown subsurface conditions, Article 12.1.7 was limited to stop work orders, written interpretations of the work or minor changes in the work and Article 12.2.1 was limited to change orders. Consistent therewith, the arbitrators could have interpreted the more liberal notice provisions of Article 7.4.1 as applicable to claims for delay damages. Article 7.4.1 (BA32) requires written notification of claim for any injury or damage "within a reasonable time after the first observance of such injury or damage." Also, the arbitrators may have decided that the parties waived the formal notification provisions by their own conduct and the fact of actual knowledge, which is conceded. Any or all of the aforesaid interpretations of the

applicable contract provisions, in light of the relationship between the parties, is, at worst, reasonably debatable. This is especially true in light of the absence of any known reported authority which mandates the adoption of the Appellate Division's interpretation of the Article 12 notice requirements.

It clearly follows that the decision of the Superior Court of New Jersey, Appellate Division, which the Supreme Court of New Jersey chose not to disturb, constitutes the substitution by the Appellate Division of its interpretation of the contract for that of the arbitrators. The fact that the Appellate Division chose this course is not in itself surprising in view of the fact that it was dealing with substantial awards against a political subdivision of the State and in favor, in large part, of out-of-state corporations. What is

surprising, however, was the Appellate Division's view that its actions were in accord with this Court's holdings with respect to the permissible review of arbitration awards. Clearly, this Court should not allow such a gross misapplication of this Court's pronouncements, binding as it is on the lower courts of New Jersey, to stand. The result would be a complete erosion of the value of arbitration agreements where the parties to those agreements must seek enforcement in the New Jersey courts.

Arbitration awards subject to the standard of review set forth by the New Jersey Courts in the instant case would be essentially meaningless. The informality characteristic of most arbitrations is one of the primary benefits sought by parties in agreeing to arbitration. Under the standard of review applied in the instant case,

however this informality presents futile ground whereby an able jurist could overturn any award.

The message of the New Jersey Courts in the instant case is clear. If one is to arbitrate in New Jersey, one should make sure that the arbitrators are experienced judges. One should make sure that each and every evidentiary ruling is impeccable. One should make sure that each and every equitable and legal principle considered by the arbitrators is enunciated fully so that speculation by a reviewing court cannot lead to the overturning of the award. Finally, and perhaps most importantly, one should make sure he does not obtain an award against a political subdivision of the State of New Jersey.

It is submitted that if this message is not quickly muted by this Court, arbitration as a viable

alternative to litigation will die a slow death as award after award is overturned and the process becomes so burdensome as to make crowded dockets in the lower courts seem extremely attractive. Such a result is clearly contrary to the policy of Congress in favoring arbitration which has often been recognized by this Court. See, e.g., Moses H. Cone Memorial Hospital v. Mercury Construction Corp., ___ U.S. ___, 74 L.Ed.2d 765, 785, 103 S. Ct. 927, 941 (1983).

This Court can and should prevent the possibility of this result by a swift and decisive correction of the aberrational result reached by the New Jersey courts in the instant case.

CONCLUSION

Based upon all of the foregoing and upon the reasoning set forth in the Petition for Certiorari filed by J. Baranello & Sons under Docket No. 83-1430, it is submitted that this Court should grant the Petition of Baranello and the within Cross-Petition for Writ of Certiorari to the New Jersey Supreme Court.

Dated: Hackensack, New Jersey
March 23, 1984.

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J. BARANELLO & SONS,
INC.,

Plaintiff-
Petitioner,
v.

SUPREME COURT
OF NEW JERSEY

CITY OF PATERSON,
Defendant-
Respondent.

Docket No.

CONSOLIDATED PRECAST,
INC.,

Plaintiff-
Petitioner,
v.

SAT BELOW

CITY OF PATERSON,
Defendant-
Respondent.

Hon. Theodore I.
Botter

Hon. Warren
Brody

INDEPENDENT ELECTRICAL
CONSTRUCTION CO., INC.,

Plaintiff-
Petitioner,
v.

CITY OF PATERSON,
Defendant-
Respondent.

THE CONDITIONING CO., :
INC., a corporation of :
the State of New Jersey, :
Plaintiff- :
Petitioner, :
v. :
: :
CITY OF PATERSON, :
Defendant- :
Respondent. :

PETITION FOR CERTIFICATION

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Finally, this Court should be mindful of the recent ruling of the United States Supreme Court that federal substantive law of arbitration takes precedence over state law where the underlying contract involves a transaction affecting interstate commerce. Moses H. Cone Memorial Hospital v. Mercury Construction, 455 U.S. 937, 74 L.Ed.2d 765, 103 S.Ct. 927 (1983). Consolidated is a Connecticut Corporation and its contract with the City called for the fabrication of precast concrete panels at its plant in Connecticut and the shipment thereof to the Project site for erection. At the moment, there is no perceptible difference between the substantive law of arbitration as determined by this Court and federal law. However, the opinion of the Appellate Division in

this case is a drastic departure from the leading federal decisions which consistently express a liberal federal policy favoring arbitration and sharply limiting the powers of courts to review arbitration awards. See, United Steelworkers of America, AFL-CIO v. American Smelting and Refining Co., 648 F.2d 863 (3rd Cir. 1981), cert. den. 102 S. Ct. 567, 454 U.S. 1031, 70 L.Ed.2d 474; In re I/S Staubog v. National Metal Converters, Inc., 500 F.2d 424 (2nd Cir. 1974); Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co., 397 F.2d 594 (3rd Cir. 1968), cert. den. 89 S. Ct. 378, 393 U.S. 954, 21 L.Ed.2d 365.

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